

IN THE
MISSOURI SUPREME COURT

| | | |
|------------------------|---|--------------|
| ECCLESIASTES MATTHEWS, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | No. SC 86784 |
| |) | |
| STATE OF MISSOURI, |) | |
| |) | |
| Respondent. |) | |

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
TENTH JUDICIAL CIRCUIT
THE HONORABLE RONALD MCKENZIE, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

Mark A. Grothoff, MOBar #36612
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

INDEX

| | <u>Page</u> |
|-------------------------------|-------------|
| TABLE OF AUTHORITIES | 2 |
| JURISDICTIONAL STATEMENT..... | 4 |
| STATEMENT OF FACTS..... | 5 |
| POINT RELIED ON | 11 |
| ARGUMENT | 13 |
| CONCLUSION..... | 19 |

TABLE OF AUTHORITIES

Page

CASES:

| | |
|--|-----------|
| <u>Ex parte Ross</u> , 269 S.W. 380 (Mo. banc 1925) | 17 |
| <u>Hightower v. State</u> , 1 S.W.3d 626 (Mo. App. S.D. 1999)..... | 17 |
| <u>Jones v. State</u> , 824 S.W.2d 441 (Mo. App. E.D. 1991)..... | 17 |
| <u>Moss v. State</u> , 10 S.W.3d 508 (Mo. banc 2000)..... | 12, 17 |
| <u>State v. Cella</u> , 976 S.W.2d 543 (Mo. App. E.D. 1998) | 12, 17 |
| <u>State v. Jaco</u> , 156 S.W.3d 775 (Mo. banc 2005) | 12, 15-16 |
| <u>State v. Kenney</u> , 973 S.W.2d 536 (Mo. banc 1998)..... | 12, 15 |
| <u>State v. Matthews</u> , 99 S.W.3d 494 (Mo. App. E.D. 2003)..... | 9 |
| <u>State v. Weaver</u> , 912 S.W.2d 499 (Mo. banc 1995)..... | 17 |

CONSTITUTIONAL PROVISIONS:

| | |
|---|-------|
| United States Constitution, Amendments VI and XIV | 11-13 |
| Missouri Constitution, Article I, Section 18(a)..... | 11-13 |
| Missouri Constitution, Article V, Section 10..... | 4 |

STATUTES:

| | |
|-----------------------------------|-----------|
| Section 478.720, RSMo. 2000 | 5 |
| Section 508.320, RSMo. 2000 | 12, 14-16 |

RULES:

| | |
|--------------------------------|-----------------|
| Supreme Court Rule 29.15 | 4, 11-13, 18-19 |
| Supreme Court Rule 32.03 | 12, 14-18 |
| Supreme Court Rule 83.04 | 4, 10 |

JURISDICTIONAL STATEMENT

This appeal arises from the denial of appellant's Rule 29.15 motion without an evidentiary hearing in the Circuit Court of Marion County, Missouri, the Honorable Ronald McKenzie presiding. After the Missouri Court of Appeals, Eastern District, issued its opinion in case No. ED 84656, this Court granted respondent's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

Appellant was charged by information with two counts of the Class A felony of delivery of a controlled substance near schools in the Marion County Circuit Court, District 2, at Hannibal.¹ (L.F. 1, 7-8).² On October 18, 2001, appellant filed a joint motion for change of judge and change of venue (L.F. 1). Appellant's change of judge request was granted on October 25, 2001 (L.F. 1-2). On December 4, 2001, appellants request for a change of venue was "sustained" and the case was transferred to the Marion County Circuit Court, District 1, at Palmyra (L.F. 2). Prior to trial, a jury panel was selected from the population of the Palmyra District of Marion County (L.F. 3). Appellant's trial counsel did not object to the jury pool.

On January 3, 2002, an amended information was filed charging appellant with two counts of the Class B felony of delivery of a controlled substance (L.F. 3, 9-10). On the same day, a jury was chosen from the jury pool and the case

¹ Section 478.720 divides Marion County into two districts: District 1 at Palmyra and District 2 at Hannibal.

² The record on appeal will be designated as follows: the transcript from appellant's trial will be designated (Tr.); the legal file from appellant's direct appeal will be designated (L.F.); and the legal file for this appeal of appellant's post-conviction motion will be designated (PCR L.F.).

proceeded to trial in the Circuit Court of Marion County at Palmyra (Tr. 1, 10, 127). The following evidence was adduced at trial.

On December 9, 1999, special agents with the Missouri Northeast Narcotics Task Force were working with a confidential informant, Craig Haley, who had agreed to cooperate with authorities in hopes of lenient treatment for a pending sale of controlled substances charge (Tr. 134-136, 171-173). The officers took Haley to Fitz's Lounge in Hannibal, searched him for contraband, supplied him with a body wire, and gave him some buy money (Tr. 136-138).

Haley entered the lounge and approached appellant (Tr. 166). He asked appellant whether he had anything for him (Tr. 166). The two went into the bathroom, and appellant told Haley that he had a \$40 and \$50 piece (Tr. 166). Haley asked for the \$50 piece (Tr. 166). Appellant pulled something out of his mouth and handed it to Haley (Tr. 166). Haley gave appellant \$50 (Tr. 166).

Haley left the building and brought the authorities a cellophane-wrapped package containing a white, chalky substance (Tr. 142). The package contained .33 gram of cocaine, a controlled substance (Tr. 251).

On May 23, 2000, another confidential informant, who faced sentencing on drug sale charges, Dennis Thomas, contacted the task force and led officers to Fitz's Lounge (Tr. 176-179, 201). After being searched, body-wired, and given buy money, Thomas entered the lounge in search of crack cocaine (Tr. 201). There he met appellant, who told Thomas that he did not have anything (Tr. 201).

As Thomas left the lounge, appellant and Karnell Fitzpatrick walked out of the bar, and Fitzpatrick told Thomas that he had some (Tr. 201). Just then a police officer drove by and observed the three, and Fitzpatrick became frightened and went back inside Fitz's (Tr. 205).

Thomas approached appellant and asked for "a sixteenth" (Tr. 205). Appellant replied that it would take 30 minutes, and would cost \$110 (Tr. 205). Thomas then left (Tr. 205-206).

When Thomas returned to the bar in the back of the lounge, appellant asked if he had the money, and then took a baggie out of his mouth and placed it on a speaker (Tr. 207). Thomas picked it up and gave the money to appellant (Tr. 208). The baggie contained .6 gram cocaine base (Tr. 253).

Both informants conceded that they were facing drug sale charges and hoping to avoid prison by testifying against appellant (Tr. 171, 209, 215). The defense questioned Haley as to whether he had been charged, and he admitted that he had (Tr. 174). The state elicited that he was not currently facing charges (Tr. 174). When the defense attempted to establish what had become of these charges, the state objected, and the trial court sustained the objection (Tr. 174).

The defense cross-examined Thomas as to his claim that Fitzpatrick had no drugs, and asked Thomas whether he had previously purchased drugs from Fitzpatrick (Tr. 212). The state objected, and at the bench, the defense explained that this fact, along with a romantic relationship between Fitzpatrick and Thomas' daughter, was relevant to show a motive for identifying appellant rather than

Fitzpatrick as the source of the drugs (Tr. 212-214). The trial court agreed to the cross-examination, but the state complained, and the court reversed its ruling (Tr. 214).

The state called Hannibal police officer Edward Stratton to testify that in the course of this second transaction he drove by in a police car and saw appellant and Fitzpatrick together (Tr. 236). When Officer Stratton finished testifying, the trial court began a lengthy personal conversation with him regarding his service in the Guard, asking him whether he had been activated; where he was; how long he would be there; how many soldiers were up there; whether he went in with the Guard (Tr. 240-242). The judge also explained to Officer Stratton that he had been in the Guard years ago, and that this was an entrée for him to date girls in Palmyra (Tr. 241).

Appellant testified in his own defense (Tr. 265). Appellant testified that, on December 9, 1999, Craig Haley never asked him for drugs, and that Haley had his own drugs that he was selling (Tr. 266-267). Appellant said Haley spoke with him for a couple of minutes that night, then just walked off (Tr. 267-268). Appellant also testified that he never spoke with, or had any contact with, Dennis Thomas on May 23, 2000 (Tr. 269-270). Appellant denied that he sold any drugs (Tr. 270-271).

After deliberation, the jury returned verdicts of guilty on both counts (Tr. 308; L.F. 32-33). On February 7, 2002, appellant was sentenced as a prior drug

offender to consecutive prison terms of 25 years on each count (Tr. 321; L.F. 42-43).

On February 15, 2002, appellant filed a notice of appeal of his convictions (L.F. 44-45). On direct appeal, appellant's counsel asserted that the trial court erred in sustaining the state's objection to appellant's cross-examination of Haley regarding the disposition of the charges against him, in limiting appellant's cross-examination of Thomas regarding his bias against appellant, and in having a personal conversation with Officer Stratton in front of the jury. State v. Matthews, 99 S.W.3d 494 (Mo. App. E.D. 2003). On March 11, 2003, this Court issued a per curiam opinion affirming appellant's convictions. Id. This Court's mandate was issued on April 9, 2003 (PCR L.F. 31).

On May 1, 2003, appellant filed a pro se motion to vacate, set aside, or correct his judgment or sentence (PCR L.F. 1-2). On July 31, 2003, appellant filed an amended motion for post-conviction relief (PCR L.F. 1, 15). The motion alleged that appellant was denied due process and effective assistance of counsel in that: (1) his trial counsel failed to object to the court's failure to provide appellant with a proper change of venue and his appellate counsel failed to assert that issue on direct appeal, (2) his trial counsel failed to present evidence of possible alternative sources of the cocaine allegedly sold to Craig Haley, (3) his trial counsel failed to challenge the jury selection process in Marion County prior to trial, and (4) his trial counsel failed to play the surveillance tape of the alleged transactions for the jury (PCR L.F. 16-29).

On April 15, 2004, the motion court denied an evidentiary hearing and issued findings of fact and conclusions of law denying appellant's motion for post-conviction relief (PCR L.F. 1, 31-33). By leave of this Court, appellant filed a notice of appeal on June 16, 2004 (PCR L.F. 35-37).

On appeal, the Eastern District Court of Appeals reversed the motion court's denial of appellant's post-conviction motion and remanded the case for an evidentiary hearing on appellant's claims regarding the improper change of venue and the failure to play the surveillance tape for the jury. This Court subsequently granted respondent's application for transfer pursuant to Rule 83.04.

POINT RELIED ON

I.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial and appellate counsel failed to act as reasonably competent attorneys would under the same or similar circumstances because his trial counsel failed to object to the trial court transferring the case to another district within the same county rather than providing appellant with a proper change of venue, and because his appellate counsel failed to challenge the trial court's failure to grant appellant a proper change of venue on direct appeal.

Appellant was prejudiced by his trial counsel's failure to object to the transfer between districts in the county as an inappropriate change of venue in that, had such an objection been made, a reasonable probability exists that the proper change of venue to which appellant was entitled as a matter of right would have been provided. Appellant was also prejudiced by his appellate counsel's failure to challenge the trial court's failure to grant a proper change of venue on direct appeal in that, had this issue been properly asserted, a reasonable probability exists that the appellate court would have reversed appellant's conviction.

State v. Cella, 976 S.W.2d 543 (Mo. App. E.D. 1998);

State v. Jaco, 156 S.W.3d 775 (Mo. banc 2005);

State v. Kenney, 973 S.W.2d 536 (Mo. banc 1998);

Moss v. State, 10 S.W.3d 508 (Mo. banc 2000);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sect. 18(a);

Section 508.320, RSMo.;

Rule 32.03; and

Rule 29.15.

ARGUMENT

I.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial and appellate counsel failed to act as reasonably competent attorneys would under the same or similar circumstances because his trial counsel failed to object to the trial court transferring the case to another district within the same county rather than providing appellant with a proper change of venue, and because his appellate counsel failed to challenge the trial court's failure to grant appellant a proper change of venue on direct appeal.

Appellant was prejudiced by his trial counsel's failure to object to the transfer between districts in the county as an inappropriate change of venue in that, had such an objection been made, a reasonable probability exists that the proper change of venue to which appellant was entitled as a matter of right would have been provided. Appellant was also prejudiced by his appellate counsel's failure to challenge the trial court's failure to grant a proper change of venue on direct appeal in that, had this issue been properly asserted, a reasonable probability exists that the appellate court would have reversed appellant's conviction.

In its substitute brief, the state relies on Section 508.320 as providing for a change of venue from District 2 to District 1 in Marion County. Indeed, Section 508.320 states:

1. Any case which may be pending in district number 2 of the circuit court of Marion County, Missouri, may be removed by change of venue for the following causes:

(1) That the inhabitants of Mason and Miller townships, Marion County, Missouri, are prejudiced against the applicant;

(2) That the opposite party has an undue influence over the inhabitants of said townships.

2. The change of venue may be awarded to any circuit court, including district number 1 of the circuit court of Marion County, Missouri, in the same manner that changes are taken from other circuit courts, and the court to which such cause may be removed shall have power and jurisdiction to dispose of the same as in causes taken by change of venue from circuit courts.

However, the state's reliance on Section 508.320 is misplaced. Appellant's motion for a change of venue was based on Rule 32.03, not Section 508.320. Rule 32.03 states:

(a) A change of venue shall be ordered in any criminal proceeding triable by a jury pending in a county having seventy-five thousand or fewer inhabitants upon the filing of a written application therefor by the

defendant. In felony and misdemeanor cases the application must be filed not later than ten days after the initial plea is entered. The defendant need not allege or prove any reason for change. The application need not be verified and shall be signed by the defendant or the defendant's attorney.

- (b) A copy of the application and notice of the time when it will be presented in the court shall be served on all parties.
- (c) If a timely application is filed, the court immediately shall order the case transferred to some other county convenient to the parties, first giving all parties an opportunity to make suggestions as to where the case should be sent. In lieu of transferring the case to another county, the court may secure a jury from another county as provided by law.

As acknowledged by the state in its substitute brief, when a conflict exists between the Supreme Court rules and a statute, the rule always prevails if it addresses practice, procedure, or pleadings, State v. Jaco, 156 S.W.3d 775, 781 (Mo. banc 2005), and rules that provide for a change of venue are procedural. State v. Kenney, 973 S.W.2d 536, 540-541 (Mo. banc 1998).

There are at least three conflicts between Section 508.320 and Rule 32.03. One conflict is in the intended scope of the statute and the rule. Section 508.320 contemplates a venue change for the particular causes listed in the statute, whereas Rule 32.03 contemplates an automatic change of venue as a matter of right. The rule specifically states that a reason for the change need not be alleged or proven.

Rule 32.03(a). Thus, the intended scope of the rule is much broader than that of the statute.

Another conflict is in the requirement placed upon the court by the statute and the rule. Section 508.320 utilizes the permissive word “may”, whereas Rule 32.03 uses the compulsory word “shall”. Thus, a change of venue may or may not be provided under the statute, but a change of venue is automatically mandatory pursuant to the rule.

A third conflict is in the new venue to which a case is to be transferred under the statute and the rule. Section 508.320 contemplates a transfer between “districts” within Marion County, whereas Rule 32.03 mandates that the case be “transferred to some other county”. A “district”, or portion, of the same county is clearly not the same as, and just as clearly does not meet the mandate for, a transfer to “some other county”.

Such conflicts should be resolved in favor of the rule. State v. Jaco, supra. Thus, appellant’s trial should have been transferred to a county other than Marion County upon appellant’s timely motion pursuant to Rule 32.03. Yet, neither appellant’s trial counsel nor appellate counsel challenged the trial court’s failure to provide appellant with a proper change of venue.

In addition, the state cited in its substitute brief a number of cases ostensibly in support of its contention that appellant has not established prejudice.³ However, the cases cited by the state are distinguishable in that they all deal with a failure to seek a change of venue pursuant to Rule 32.03, whereas the present case involves the failure to provide a proper change of venue as a matter of right upon the timely filing of a motion pursuant to Rule 32.03

Moreover, in one of the cases cited by the state, this Court found that it is reversible error for a trial judge to deny a timely filed Rule 32.03 motion for change of venue. Moss v. State, 10 S.W.3d 508, 513 (Mo. banc 2000). The prejudice was complete when appellant did not receive the change of venue to which he was entitled as a matter of right after making a timely request. Because appellant was entitled to a true change of venue, the court was without jurisdiction to proceed other than to transfer the case to another county. See: State v. Cella, 976 S.W.2d 543, 552 (Mo. App. E.D. 1998). The transfer to another district within the county was wholly insufficient to afford appellant his right to the change of venue to which he was entitled.

Furthermore, the state cited Ex parte Ross, 269 S.W. 380 (Mo. banc 1925) for the proposition that an application for a change of venue does not deprive the

³ Jones v. State, 824 S.W.2d 441 (Mo. App. E.D. 1991); State v. Weaver, 912 S.W.2d 499 (Mo. banc 1995); Hightower v. State, 1 S.W.3d 626 (Mo. App. S.D. 1999); Moss v. State, 10 S.W.3d 508 (Mo. banc 2000).

original court of jurisdiction, and a refusal to grant a change of venue is an error that may be waived. However, that decision was issued approximately 60 years before Rule 32.03 and Rule 29.15 even existed. It is implausible that the Court in 1925 considered, or even conceived of, these rules, and their application and effect, some six decades before their promulgation.

Therefore, appellant respectfully requests that this Court reverse the motion court's denial of post-conviction relief and remand for a new trial, or in the alternative, affirm the Opinion of the Eastern District Court of Appeals and remand for an evidentiary hearing.

CONCLUSION

For the reasons discussed above, appellant respectfully requests that this Court reverse the motion court's denial of appellant's Rule 29.15 motion and remand for a new trial; or in the alternative, affirm the Opinion of the Eastern District Court of Appeals and remand for an evidentiary hearing.

Respectfully submitted,

Mark A. Grothoff, MOBar #36612
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,293 words, which does not exceed the 7, 750 words allowed for a reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 18th day of August, 2005, to Karen L. Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Mark A. Grothoff